

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of
Implementation of Sections 3(n)
and 332 of the Communications Act
Regulatory Treatment of Mobile
Services

GN Docket No. 93-252

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To: The Commission

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

REPLY COMMENTS OF
SACO RIVER CELLULAR TELEPHONE COMPANY

SACO RIVER CELLULAR TELEPHONE COMPANY ("Saco River"), through its attorney, hereby submits reply comments in response to the *Notice of Proposed Rulemaking* ("Notice") implementing Sections 3(n) and 332 of the Communications Act of 1934, as amended (the "Communications Act").¹ Saco River responds to the *Notice* and the comments filed thereon with respect to the application of Title II of the Communications Act to newly-defined "commercial mobile service" providers and particularly with respect to forbearance from certain Title II regulation for these carriers.

Saco River is the wireline cellular licensee for the Portsmouth-Dover-Rochester, New Hampshire NECMA. As such, Saco River is currently classified as a common carrier. Under the Federal Communications Commission's ("Commission") proposal put forth in the

¹ FCC 93-454, released October 8, 1993. The *Notice* called for comments to be filed by November 8, 1993, and reply comments to be filed by November 23, 1993.

Notice, Saco River would be classified as a commercial mobile service provider. Thus, Saco River will be directly affected by the adoption of rules in this proceeding.

Pursuant to amended Section 332(c)(1)(A) of the Communications Act,² the Commission may determine that Title II of the Communications Act need not apply to commercial mobile service providers, except that the Commission may not forbear from applying Sections 201, 202 and 208 of Title II. Notice at ¶ 56.³ However, before the Commission can forbear from regulating under Title II, it must apply a three part test. The test allows forbearance if the Commission can demonstrate that regulation: 1) is not necessary to ensure that charges, practices, classifications, or regulations for or in connection with the service are just and reasonable and are not unjustly or unreasonably discriminatory; 2) is not necessary for the protection of consumers; and 3) is consistent with the public interest.

The Commission's tentative view, under this test, is that "the level of competition in the commercial mobile services marketplace is sufficient to permit us to forbear from tariff regulation of the rates for commercial mobile services provided to end users." Notice at ¶ 62. The comments filed in this proceeding overwhelmingly

² 47 U.S.C. § 332(c)(1)(A). Section 332 was amended by the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b), 107 Stat. 312, 392 (1993).

³ Section 201 requires carriers to provide service upon reasonable request and upon reasonable terms. Section 202 prohibits unjust or unreasonable discrimination. Section 208 allows parties to seek enforcement of these obligations by complaint to the Commission. See 47 U.S.C. §§ 201, 202, 208.

support the Commission's tentative conclusion.⁴ Saco River also supports this conclusion.

Historically, cellular service providers have not been subject to the tariff filing requirements of Section 203 of the Communications Act or certain other Title II obligations. Indeed, when the Commission first authorized cellular service in 1981, it observed that sufficient competition existed to obviate the need for federal rate regulation.⁵ Shortly thereafter, the Commission found generally that forbearance of tariff regulation for carriers subject to competition, i.e., non-dominant carriers, was consistent with the public interest.⁶ As a result, cellular carriers have never filed federal tariffs (with the exception of certain tariffs for cellular access service) and many carriers operating in states that do not

4 See, e.g., Comments of PacTel Corporation, Comments of New Par, Comments of the Rural Cellular Association, Comments of McCaw Cellular Communications, Inc., Comments of the National Telephone Cooperative Association, Comments of Motorola, Inc., Comments of the Cellular Telecommunications Industry Association ("CTIA"), Comments of Sprint Corporation, Comments of Mobile Telecommunications Technologies Corp., Comments of Telocator and Comments of Nextel Communications, Inc. These commenters represent the full range of communications service and equipment providers. Even the National Cellular Resellers Association ("NCRA"), historically a proponent of stringent federal oversight of cellular carriers, generally does not take issue with forbearance of retail rate regulation under certain conditions. See NCRA Comments at pp. 17-18.

5 See *Cellular Communications Systems*, 86 F.C.C.2d 469 (1981); recon. 89 F.C.C.2d 58 (1982); further recon. 90 F.C.C.2d 571 (1982); appeal dismissed sub nom. *United States v. F.C.C.* No. 82-1526 (D.C. Cir. March 3, 1983).

6 See, e.g., *Competitive Common Carrier Services (Second Report and Order)*, 91 F.C.C.2d 59 (1982). Moreover, many states have recognized that rate regulation is unnecessary for cellular service. Saco River is not regulated in either Maine or New Hampshire, the states in which it provides wireline cellular service.

rate regulate cellular service have never filed tariffs at all. Yet, in this basically unregulated environment, there has been rapidly increasing volume, expanded offerings and technological advancements in cellular service while rates have declined in real terms.⁷

In 1992, this successfully competitive environment was disrupted by the decision in *American Tel. & Tel Co. v. F.C.C.*, 978 F.2d 727 (D.C. Cir. 1992). In this decision, the court found that the Commission could not lawfully forbear carriers from complying with the tariff filing obligations of Section 203 of the Communications Act. As a result, cellular carriers are now required to file tariffs.⁸

Fortunately, Congress recognized the folly of overzealous regulation of mobile services in enacting Title VI, Section 6002(b) of the Omnibus Budget Reconciliation Act.⁹ Congress has given the Commission authority to relieve the mobile services industry of regulation if certain competition and public interest objectives are

7 See, e.g., *New Par Comments* at 9, n.11 (citing *Cellular Competition: The Charles River Study* (1992); *CTIA Comments* at 33 and n.82.

8 Under Section 203, carriers file tariffs only for interstate service. Many cellular carriers resell long distance service to their subscribers and were previously forborne from filing tariffs for this service because long distance resellers were classified as non-dominant. See *Competitive Common Carrier Services (Fourth Report and Order)*, 95 F.C.C.2d 554 (1983). Saco River, however, is in a somewhat unique position in that the Portsmouth-Dover-Rochester NECMA it serves encompasses two states--Maine and New Hampshire. Technically, then, Saco River must file tariffs for the long distance service it resells and for its inherently local cellular service offerings as the service crosses state lines.

9 See n.2, *supra*.

not frustrated. In fact, as CTIA pointed out in its comments, "such action was specifically contemplated by Congress."¹⁰

The competitive environment that the Commission observed in initially declining to regulate cellular service rates has only become more competitive. The two facilities-based cellular carriers and numerous resellers operating in each cellular market will be joined by enhanced Specialized Mobile Radio ("SMR") providers and by as many as seven Personal Communications Service ("PCS") licensees.¹¹ The imposition of federal rate regulation the face of such a competitive marketplace would burden carriers without a corresponding benefit to the public. As the Commission has found, tariff regulation in these circumstances is "not only unnecessary to ensure just and reasonable rates, but is actually counterproductive since it can inhibit price competition, service innovation, entry into the market, and the ability of carriers to respond to market trends."¹²

Saco River urges the Commission to heed the recommendations of the commenters in this proceeding and take the opportunity provided by Congress to forbear from unnecessary regulation of commercial mobile services. Such action will relieve carriers from superfluous

10 CTIA Comments at 32 and n.81 (The Commission may specify that "the commercial mobile services need not be tariffed at all." H.R. Rep. No. 103-111, 103rd Cong., 1st Sess. (1993) at 260).


11 See *Amendment of the Commission's Rules to Establish New Personal Communications Services*, CC Docket No. 90-314, FCC-451 (released October 22, 1993) (Second Report and Order).

12 *Tariff Filing Requirements for Nondominant Common Carriers*, 8 F.C.C.R. 6752, ¶ 2 (1993).

regulatory burdens, relieve the Commission from costly and time-consuming oversight and, most importantly, best serve mobile services consumers.

Respectfully submitted,

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Dated: November 23, 1993

CERTIFICATE OF SERVICE

I, Theresa Fenelon, an attorney with the law firm of Pillsbury Madison & Sutro, hereby certify that I have on this 23rd day of November, 1993, caused copies of the foregoing "REPLY COMMENTS OF SACO RIVER CELLULAR TELEPHONE COMPANY" to be hand-delivered to the following:

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